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United Nations

Committee of Experts on International Cooperation in Tax Matters

Report on the fifteenth session (17–20 October 2017)

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(17–20 October 2017)

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Note

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Chapter I
Introduction

1. Pursuant to Economic and Social Council resolution 2004/69 and decision 27/209, the fifteenth session of the Committee of Experts on International Cooperation in Tax Matters was held in Geneva from 17 to 20 October 2017.

2. The fifteenth session of the Committee was attended by 25 Committee members and 164 observers.

3. The provisional agenda and documentation for the fifteenth session, as adopted by the Committee (E/C.18/2017/4), was as follows:

1. Opening of the session by the representative of the Secretary-General.
2. Election of the Chair and Vice-Chairs of the Committee.
3. Remarks by the Chair of the Committee.
4. Adoption of the agenda and organization of work.
5. Discussion of substantive issues related to international cooperation in tax matters:
   - (a) Procedural issues for the Committee;
   - (b) Issues related to the updating of the United Nations Model Double Taxation Convention between Developed and Developing Countries:
     - (i) Base erosion and profit shifting: updates in relation to:
       - a. Articles 1 and 5, including:
         - i. The treatment of issues related to insurance and reinsurance issues;
         - ii. Other issues related to permanent establishments;
       - b. Article 13 (Capital gains): the application of paragraphs 4 and 5;
     - (ii) Article 12 (Royalties): possible amendments to the commentary on article 12 in relation to software-related payments;
   - (c) Other issues:
     - (i) Possible update of the United Nations Practical Manual on Transfer Pricing for Developing Countries;
     - (ii) Possible update of the Extractive Industries Handbook;
     - (iii) Possible update of the Manual for the Negotiation of Bilateral Tax Treaties;
     - (iv) Treatment of collective investment vehicles;
     - (v) Mutual agreement procedure — dispute avoidance and resolution, including possible updates to the United Nations Model Double Taxation Convention and its commentaries and

the guide on the mutual agreement procedure, as well as further work on the handbook on dispute resolution;

(vi) Hybrid entities;

(vii) Capacity-building;

(viii) Environmental tax issues of relevance to developing countries;

(ix) Tax consequences of the digitalized economy — issues of relevance for developing countries;

(x) Taxation of development projects;

(xi) Other matters for consideration.

6. Provisional agenda for the sixteenth session of the Committee.

7. Adoption of the report of the Committee on its fifteenth session.

Chapter II
Organization of the session

Opening of the fifteenth session and adoption of the agenda

4. On 17 October 2017, the fifteenth session of the Committee was opened on behalf of the Secretary-General by Alexander Trepelkov, Director of the Financing for Development Office of the Department of Economic and Social Affairs, pending the election of a Chair.

5. The Director of the Financing for Development Office welcomed the new membership of the Committee and informed the participants of the general context of the work of the Committee, particularly with respect to the United Nations-led Financing for Development process, as well as the institutional arrangements pertaining to the work of the Committee. He recalled that the Addis Ababa Action Agenda of the Third International Conference on Financing for Development welcomed the work of the Committee and provided for the strengthening of the Committee's effectiveness and operational capacity by increasing the frequency of its meetings from one to two sessions per year.

6. The Director thanked the most recent membership of the Committee, its Bureau and the subcommittees and their coordinators for their dedication to the work of the United Nations over the past four years, during which impressive results were achieved, including: (a) an updated version of the United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries; (b) a revised edition of the United Nations Practical Manual on Transfer Pricing for Developing Countries; (c) an updated version of the United Nations Model Double Taxation Convention between Developed and Developing Countries; (d) a new handbook on the taxation of extractive industries; and (5) a United Nations Code of Conduct on Cooperation in Combating International Tax Evasion, which, upon recommendation of the Committee, had been formally adopted by the Economic and Social Council in its resolution 2017/3. The Director expressed the hope that the first four publications mentioned would be updated and improved during the four-year term of the new membership of the Committee.

7. The Director reported on the progress made in the work of the inter-agency Platform for Collaboration on Tax, a joint initiative of the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD), the United Nations and the World Bank Group. He mentioned that the Platform, as its primary task, focused on developing toolkits to provide practical guidance for developing countries to better protect their tax bases. In June 2017, the Platform released the Toolkit for Addressing Difficulties in Accessing Comparable Data for Transfer Pricing Analyses, followed in August by a consultation draft of another toolkit on the taxation of offshore indirect transfers. The Platform had also started work to assist developing countries in implementing medium-term revenue strategies.

Election of the Bureau

8. In closing, the Director of the Financing for Development Office reminded the participants of the particularity of the fifteenth session, which coincided with the new membership of the Committee, and called for a closed meeting for the Committee to elect its chair and vice-chairs.

9. The Director indicated that it had been a tradition to elect a chair and four vice-chairs each of whom came from a different geographical region of the United

Nations (of which there were five). The Committee members were also informed of the option to elect the Bureau for a two-year term or for the four years of their membership. The members chose to elect the Bureau for two years and to base their choice on experience, so that members who had previously served on the Committee could share their insights on the methods of work of the Committee with their colleagues.

10. The Committee elected Carmel Peters and Eric Mensah as Co-Chairs, William Babatunde Fowler as First Vice-Chair, Rajat Bansal as Second Vice-Chair, Natalia Aristazabal Mora as Third Vice-Chair and Cezary Krysiak as Fourth Vice-Chair. Sing Yuan Yong was designated as the Rapporteur of the fifteenth session.

Chapter III

Discussion and conclusions on substantive issues related to international cooperation in tax matters

A. Procedural issues for the Committee

11. Michael Lennard, the Secretary of the Committee, introduced the topic and indicated that the note on procedural issues for the Committee (E/C.18/2017/CRP.27) was an update of a previous paper written by the secretariat at the request of the Committee during its thirteenth session. The paper was subsequently discussed during the fourteenth session. As the previous membership's term was ending, it was decided that the issue would be dealt with by the new membership.

12. The Secretary noted that having written principles that could be referenced by the Committee during its deliberations and activities, such as work within subcommittees, would help the Committee use its resources more efficiently. Before reviewing most of the key issues raised in the paper, the Secretary suggested that such procedural guidelines be flexible enough to facilitate the work and contribution of each member, taking into account their other individual responsibilities.

13. The paper suggested creating an advisory group of former members whom the Committee might consult as needed. The Secretary said that option could keep former members engaged in the work of the Committee. The Committee could also widen the group to include other stakeholders if necessary.

14. On the issue of recording minority views during Committee debates and vote processes, the Secretary said that, traditionally, the minority view had not been recorded in the articles of the Model Convention themselves, but at times such views had been noted in the commentaries. The usual procedure had been to record them in the Committee's report. The Secretary noted some possible criteria that could be used to decide on how a dissenting view was recorded in the commentaries or in the Committee's report. Generally, as the Committee was an expert group, the view of one expert should suffice if that view continued to be held after debate, without the need for it to be seconded. There could, however, be a requirement for the expression of a minority view to be seconded by another member, who need not necessarily share the same view. The purpose of such a process would be to avoid recording a minority view based on a wrong interpretation of a text or an erroneous reasoning. The Committee could also require a "super majority" (two thirds of the membership, for instance) before a view was reflected in a commentary, but that could limit the coverage in the Model Convention of views that were not widely held but were reflective of real-world practice.

15. As for the issue of an absentee vote when a "ballot" of views was taken, the Secretary said that the view of the secretariat and that of the previous membership had been that, for a Committee member to cast his or her vote, he or she needed to be physically present for the deliberation and the vote. However, in the past, it had been largely accepted that a Committee member could express his or her view on an issue by informing the secretariat and the Chair in advance, who in turn would inform the Committee. A procedure would need to be developed if the Committee wished to formalize that procedure.

16. Other issues raised in the note concerned the day-to-day work in subcommittees, their composition, live reporting ("blogging") during meetings, the election process of the Committee's Bureau, the nature of the Committee's session report and the written procedure through which Committee members could discuss and agree on issues without attending a formal meeting.

17. While recognizing the need for a written document, which the Committee would refer to in its work, it was suggested that a subcommittee could be formed with a clear mandate, limited in time, in order to produce a report to be discussed by the Committee as soon as possible. That would allow changes to be implemented during the term of the present membership of the Committee and its subcommittees.

18. The composition of subcommittees also required the attention of the Committee. On the one hand, it appeared very difficult to limit the number of Committee members who wanted to be part of a particular subcommittee. On the other hand, the more Committee members on a subcommittee, the fewer outside participants the subcommittee could accommodate. After discussion, the Committee agreed not to limit the number of Committee members on subcommittees at the present time.

19. The secretariat was thanked for the paper and for the issues raised. It was agreed to form a subcommittee to work on drafting proposed procedures, taking into account ideas put forward during the discussion and recognizing the need for some flexibility in operation. Stephanie Smith was chosen as Coordinator of the Subcommittee on United Nations Tax Committee Practices and Procedures with the following mandate:

> The Subcommittee on United Nations Tax Committee Practices and Procedures is mandated to review the practices and procedures of the Committee with a view to improving the Committee's ability to meet its mandate while preserving sufficient flexibility.
>
> The Subcommittee should initially report to the sixteenth session of the Committee, especially in relation to practices and procedures relating to the formation and operation of subcommittees, the expression of minority opinions and voting procedures.

B. Tax consequences of the digitalized economy — issues of relevance for developing countries

20. The Secretary introduced the topic by identifying the following issues that would be discussed in relation to the tax consequences of the digitalized economy: (a) challenges of the digitalized economy: an overview; (b) tax challenges in the digitalized economy: selected issues for possible Committee consideration; (c) the taxation of fees for technical, managerial and consultancy services in the digitalized economy with respect to article 12 A of the 2017 update of the Model Convention; and (d) benefits and opportunities for the tax administrations derived from the digitalization of the economy. The presentations aimed to stimulate a debate among Committee members on the need to further examine the tax consequences of the digitalized economy and take actions that reflected the interests of developing countries.

Tax challenges in the digitalized economy

21. The first two presentations, by Marc M. Levey, of Baker McKenzie (speaking in a personal capacity), and Styliani Ntoukaki, a former intern with the secretariat, highlighted some of the challenges States faced from the digitalized economy. The challenges included the possibility for multinational enterprises to generate income in States without having a physical presence or nexus, which allowed some multinational enterprises to avoid paying taxes to source States. The determination of the place of value creation for digital data was another challenge to be considered when determining the State to which the profits should be attributed. The risk of introducing inconsistent treatments between online retailers and "brick-and-mortar" retailers was also raised.

22. The speakers pointed out that, although the topic had been discussed for years in other forums, the solutions proposed and implemented did not properly resolve the issues raised in the papers. The speakers suggested that the Committee was in a special position to take up the challenge of creating a common international framework to help countries avoid uncoordinated and unilateral measures, while still achieving taxation where value was created, when dealing with the tax challenges resulting from the digitalization of the economy.

Taxation of fees for technical, managerial and consultancy services in the digitalized economy

23. David Orzechowski,also a former intern with the secretariat, spoke on the taxation of fees for technical, managerial and consultancy services in the digitalized economy, particularly under article 12 A of the 2017 Model Convention. He noted that, under that article, the physical presence of a provider was not required for a State to tax the profit generated by the provision of the digital services to a person in that State.

24. Mr. Orzechowski noted that the inclusion of article 12 A in the 2017 Model Convention would, to the extent it was adopted in bilateral treaties, lead to a significant change in the allocation of taxing rights of income from technical, managerial and consultancy services. In that sense, he was of the opinion that the inclusion of article 12 A in the 2017 Model Convention exemplified how rethinking traditional concepts might lead to a more appropriate attribution of taxing rights in the digitalized economy, especially in response to the realities and priorities of developing countries.

Benefits and opportunities for the tax administrations derived from the digitalization of the economy

25. Another perspective on the digitalized economy was presented by Chris Sanger of Ernst & Young. He touched upon the benefits and opportunities derived from the digitalization of the economy for tax administrations, which were transformation, transparency and technology. He noted that tax administration practices had not yet caught up with the speed of change in the business environment. He noted that, if tax administrations engaged in digitalization by implementing electronic filing, electronic accounting, electronic matching of taxpayer data, electronic auditing and electronic assessment, they could increase cooperation with other tax administrations and set clear international standards.

Developments at the Organisation for Economic Coordination and Development

26. The Committee was also briefed by Sophie Chatel of the OECD secretariaton the work recently done by OECD in the area of the digitalized economy. OECD was tasked by the Group of 20 with writing a report on the issue, which would focus on both long-term and short-term solutions. To draft the report, OECD launched consultations with business, academia and civil society. The presenter indicated that the task would not be easy. The solutions to be proposed by OECD would need to interact with double tax treaties, World Trade Organization agreements and European Union law. OECD was expected to present an interim report in April 2018, with a final report due by 2020.

27. Many Committee members considered it important to create a subcommittee to analyse tax issues related to the digitalization of the economy and describe possible ways forward. For that purpose, the subcommittee could consider developments in

other international forums, such as OECD, the World Bank, the European Union and IMF, while paying particular attention to the needs of developing countries.

28. The issue of whether that subcommittee would also analyse tax administration issues related to digitalization was debated at length and included varying views. Given the fact that one of the proposed co-coordinators of the subcommittee had already left the meeting, the secretariat proposed that the subcommittee discuss and deal with both the tax challenges of the digitalization of the economy and the tax administration issues related to the digitalized economy until the next Committee meeting in May 2018, where the subcommittee would report to the Committee for a decision on whether two subcommittees could be formed, each dealing with one of the two issues.

29. That proposal was accepted, and the Subcommittee on Tax Challenges Related to the Digitalization of the Economy was formed, to be coordinated by Mr. Babatunde Fowler and Aart Roelofsen with the following proposed mandate:

> The Subcommittee is mandated to draw upon its own experience as a body widely representative of affected stakeholders and engage with other relevant bodies and interested parties with a view to:
>
> - Analysing technical, economic and other relevant issues;
> - Describing difficulties and opportunities especially of interest to the various affected agencies of developing countries;
> - Monitoring international developments;
> - Describing possible ways forward; and
> - Suggesting measures and drafting provisions related to the digitalization of the economy, with regard to:
>   - o Income taxes;
>   - o Double tax treaties;
>   - o Value added tax as well as other indirect taxes; and
>   - o Tax administration issues.
>
> The Subcommittee will report on its activities, recommendations and conclusions at each Committee session with an initial response on issues, possible options and working methods for consideration by the sixteenth session in May 2018.

C. Environmental tax issues of relevance to developing countries

30. The topic was presented by Tatiana Falcão, a former staff member of the secretariat. She put the subject in context by reminding the participants that the United Nations Secretariat had presented a paper on the issue based on the experience of Sweden with environmental taxation in 2015. The Committee took interest in the issue at its twelfth and fourteenth sessions, but could not devote more time to the issue as it was finishing up other topics before the renewal of its membership. The Committee recommended that the next membership might wish to continue studying the issue and provide guidance to countries on policy and other issues pertaining to environmental taxation.

31. Ms. Falcão noted that the main justification for an environmental tax was to try to curb the emission of greenhouse gases and therefore protect the environment. She reviewed environmental taxation policies that were currently in use across countries

and presented examples of countries that had already implemented some form of environmental tax.

32. Ms. Falcão briefly discussed how the issue related to the overall topic of sustainable development within the United Nations system. She remarked that the United Nations had put forward three agreements: (a) the United Nations Framework Convention on Climate Change; (b) the Kyoto Protocol; and (c) the Paris Agreement. Signed in 1994, the Convention on Climate Change required countries to implement policies that were to reduce and contain the emission of greenhouse gases at levels that prevented interference with the climate system. It established targets for optimum emission levels only for developed countries, but there was no built-in system to assess their progress. The Kyoto Protocol tried to set a maximum level of greenhouse gas emissions in the atmosphere for each country and allowed countries to trade among themselves their "rights to pollute", in what was known as the "cap and trade" scheme. The emission trading markets were supposed to result in a substantial change in behaviour for consumers, which result in the limitation of carbon emissions to desired levels.

33. Ms. Falcão pointed out that this market-based approach to reducing the carbon emission was not enough to achieve the desired level of carbon emissions, and that countries quickly laid out other suitable instruments to curb greenhouse gas emissions.

34. The set of tools to attain the desired level of greenhouse gases in the atmosphere was described in the Paris Agreement. Those instruments included green financing, green bonds and environmental taxes.

35. With regard to tax policy options, Ms. Falcão described three approaches: upstream taxes, mainstream taxes and downstream taxes. The upstream tax was a tax applied to extraction activities, and was most suitable for countries that were endowed with significant natural resources. The mainstream tax was mostly applied to refineries or to transport activities. That type of tax was easy to administer because it involved a limited number of taxpayers, but it did not capture the entire process, because polluting activities might occur during the extraction process. The downstream tax was usually applied during the acquisition of the final product by consumers. It was suited for countries that were not rich in mineral resources but had large consumer markets.

36. Ms. Falcão explained that upstream, mainstream and downstream taxes were usually applied in an automated manner that made them easy and cost-effective to administer. She noted that such taxation, which did not require additional resources to administer, might be a good source of revenue for countries. Such taxation would also allow developing countries to derive revenue from both the formal and informal sectors.

37. In describing the experiences of countries in applying the carbon tax, Ms. Falcão pointed out some difficulties that could arise. Some governments, to justify the tax and its benefit on sustainable development, had had to eliminate other types of taxes to render the carbon tax revenue-neutral. Others had opted to earmark the tax revenue collected and use it to fund environmental activities. In each case, there were options to consider that depended on the country's situation. She suggested that this might justify setting up a subcommittee to study the issue in depth.

38. The participants who took the floor all agreed to the idea of setting up a subcommittee, with some suggesting that the subcommittee have a broader mandate to look into all revenue-related policies that influenced climate change, especially policies established in accordance with the Paris Agreement. Many countries, especially developing countries, might need guidance on the implementation of their commitments. The Committee agreed to form a Subcommittee on Environmental

Taxation Issues and Ms. Aristazabal Mora was appointed the Coordinator of the Subcommittee. The mandate of the Subcommittee is as follows:

> The Subcommittee is mandated to consider, report on and propose guidance on environmental tax issues and opportunities for developing countries in particular, on the basis that it shall:
>
> - Identify and consider the most pressing issues where guidance from the Committee may most usefully assist developing countries in this area and initially report to the Committee on such issues at its sixteenth session in 2018;
> - Pay particular attention to the application of carbon taxes, and report on current country practices, policy considerations and administrative issues;
> - Provide draft guidance on such issues as are approved by the Committee at its sessions.
>
> In undertaking its work, the Subcommittee shall consult broadly and seek to engage with others active in the field. The Subcommittee shall report on its work at each session.

D. Possible update of the United Nations Practical Manual on Transfer Pricing for Developing Countries

39. Introducing the second edition of the United Nations Practical Manual on Transfer Pricing for Developing Countries, the Coordinator of the previous Subcommittee on Article 9 (Associated Enterprises): Transfer Pricing, Stig Sollund, gave a brief description of the process that led to the publication of the Manual and subsequently to its second edition.

40. He recalled that, at the beginning, some were concerned that the Manual might lead to different and competing methodologies for the "arm's length principle", which was the underlying principle for evaluating transfer pricing recommended by other organizations, including OECD. However, he remarked, the Subcommittee sought consistency with article 9 of the Model Convention, which recognized the "arm's length principle" as the necessary principle for evaluating transfer pricing. The Manual also included some country practices in the area of transfer pricing and tried to take into account the particular situation of developing countries and domestic laws.

41. Mr. Sollund pointed out that the Manual was meant to be a living document, to be continually improved and updated. He gave an example of the latest update of the Model Convention in which the commentary on article 9 was revised, which was one of the bases for the update of the Manual. During the preparation of the first edition of the Manual, some topics that were recognized as important could not be fully addressed by the time of the first publication. Topics such as "intra-group services", "cost contribution arrangements" and the work on the Base Erosion and Profit Shifting Project on "intangibles" were added to the second edition of the Manual in the form of new chapters. Country practices were updated by the relevant countries, and the country practices of Mexico were added.

42. He suggested that a new subcommittee on the same topic could study and make recommendations on how to make the Manual even more practical, including by having more country examples and through collaborating with other institutions involved in the development of capacity-building activities for developing countries. He noted the practical case of transfer pricing for the extractive industries and the work done in the past with the Subcommittee on Extractive Industries Taxation Issues for Developing Countries to address transfer pricing in the publication developed by

that Subcommittee, but he advised against adding chapters in the Manual for each industry.

43. In the discussion that ensued, the Co-Chair of the Committee declared the official launch of the second edition of the Manual. Mr. Sollund and the members of the previous Subcommittee on Article 9 (Associated Enterprises): Transfer Pricing were thanked for their work. A new Subcommittee on Article 9 (Associated Enterprises): Transfer Pricing was formed, to be co-coordinated by Ingela Willforsand Mr. Sollund, with the following mandate:

> The Subcommittee is mandated to review and update the United Nations Practical Manual on Transfer Pricing for Developing Countries, based on the following principles:
>
> - That it reflects the operation of article 9 of the United Nations Model Convention, and the Arm's Length Principle embodied in it, and is consistent with relevant Commentaries of the United Nations Model;
> - That it reflects the realities for, and the needs of, developing countries, at their relevant stages of capacity development;
> - That special attention should be paid to the experience of developing countries, and the issues and options of most practical relevance to them; and
> - That it draws upon the work being done in other forums.
>
> The Subcommittee shall give due consideration to the outcome of the OECD/G20 Action Plan on Base Erosion and Profit Shifting as concerns transfer pricing. The Manual shall reflect the special situation of least developed economies.
>
> The Subcommittee shall report on its progress at the sessions of the Committee and provide its final updated draft Manual for discussion and adoption no later than the twenty-second session in 2021 and preferably in 2020.

E. Possible update of the handbook on extractive industries taxation issues for developing countries

44. The Secretary of the Committee summarized the work done by the last membership of the Subcommittee on Extractive Industries Taxation Issues for Developing Countries, which included the completion of a new handbook on the taxation of extractive industries for developing countries. The handbook had been approved by the previous Committee and was currently being edited. He noted that a digital version of the handbook would be made available on the website of the Committee and that paper copies were expected to be ready for the next meeting of the Committee in 2018.

45. In addition, the Secretary mentioned that, although important work in the area has been completed, certain topics could not be covered in the handbook. He illustrated some of the possible topics that could not be covered in the handbook and on which the guidance of the Committee might be of benefit to developing countries and those working in such countries, including: (a) best practice in auditing oil and gas or mining activities; (b) "trade mispricing" issues, insofar as they differed from general transfer pricing issues (an issue kept open for future consideration by the previous Subcommittee); (c) the tax treatment of subcontractors and service providers; (d) production-sharing contracts; (e) the tax treatment of financial transactions that supported the extractive and energy sector, such as hedging, finance leases, debt

financing and thin capitalization issues; (f) environmental tax issues; and (g) tax incentives in the extractive industries.

46. The Coordinator of the previous Subcommittee on Extractive Industries Taxation Issues for Developing Countries, Mr. Mensah, also referred to the work conducted on the subject. He indicated that the previous Subcommittee was established for the first time in 2013 and that its members met over the four-year period of the previous Committee membership. The membership of the Subcommittee was very diverse, and included Committee members and representatives from government, business and civil society. That allowed the Subcommittee to have a broad perspective on the extractive industry, which was reflected in its output. He also pointed out that the previous Committee recommended continuing the work on the handbook on taxation of extractive industries since, as was indicated by the Secretary, many issues of relevance to developing countries in the extractive industry had not yet been addressed. That recommendation was accepted by the Committee members. A new subcommittee was formed, to be coordinated by Mr. Mensah, with the following mandate:

> The Subcommittee is mandated to consider, report on and propose draft guidance on extractive industries taxation issues for developing countries in the form of updates to the United Nations Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries ("the Handbook"). This work shall be conducted on the basis that it shall:
>
> - Identify and consider the most pressing issues where further guidance from the Committee may most usefully assist developing countries in this area and initially report to the Committee on such matters at its sixteenth session in 2018;
>
> - Provide draft guidance on such issues as are approved by the Committee at its sessions; and propose other updates and improvements to the Handbook for approval.
>
> In undertaking its work, the Subcommittee shall seek to engage with other organizations active in the field. The Subcommittee shall report on its work at each session.

47. Finally, participants in the work of the Intergovernmental Forum on Mining, Mineral, Metals and Sustainable Development and OECD, Alexandra Readhead and Dan Devlin, respectively, gave a presentation on the joint project those organizations launched to tackle base erosion and profit shifting in the mining sector in developing countries. They indicated that the joint project was currently focusing its work on excessive interest deductions, abusive transfer pricing, the undervaluation of mineral exports, harmful tax incentives, tax stabilization, tax treaties, the indirect transfer of mining assets, metals streaming, abusive hedging arrangements and inadequate ring fencing. The project was intended to deliver a mix of policy guidance and administrative and enforcement guidance for tax authorities and mining ministries in developing countries. Training and direct advisory support were to be offered to members of the Intergovernmental Forum and other interested countries as well. The results of the work of the Intergovernmental Forum and OECD at the time of reporting could be found in the Toolkit for Transfer Pricing Risk Assessment in the African Mining Industry and the Toolkit for Addressing Difficulties in Accessing Comparable Data for Transfer Pricing Analyses. The two speakers expressed interest in collaborating with the Subcommittee.

F. Taxation of development projects

48. Jacques Sasseville, from the secretariat, introduced the topic of donors requesting tax waivers on aid projects by recalling the work done by the Committee between 2005 and 2007, which led to the development of draft guidelines on that issue (see E/C.18/2007/CRP.12).

49. Mr. Sasseville briefly described the issue. He noted that representatives from developing countries were familiar with the problems that arose from broad tax exemptions in relation to aid financing development projects. Because those projects were generally tax-exempt, they could reduce domestic revenue in developing countries, which was necessary to the achievement of the Sustainable Development Goals. The issue was described and analysed in a note prepared for the meeting of the Committee in 2005 (E/C.18/2005/9).

50. Mr. Sasseville noted that from 2007 to 2016 there had been little interest from donor agencies in addressing the issue. However, since the conference on tax and development organized by the International Tax Compact and the Addis Tax Initiative in June 2017, many agencies had undergone a notable change in attitude.

51. During that conference, representatives of the development agencies of the Netherlands and Norway explained how the draft guidelines helped change their approaches to the payment of taxes on projects they financed, thereby following the example set many years ago by the World Bank (in 2004) and the development agencies of countries such as France and the United Kingdom of Great Britain and Northern Ireland. One of the conclusions of the conference was that the issue should be addressed and that the draft guidelines constituted a basis for further discussion between donor agencies and the tax administrations of developing countries. In addition, at a recent meeting of the Platform for Collaboration on Tax, it was decided that the issue should be added to the work programme of the Platform.

52. The observer from the International Organization of la Francophonie explained that the Ministers of Finance of low-income countries that were members of that Organization had discussed the issue and expressed the wish that donor agencies would refrain from asking for broad exemptions on their funding of development assistance projects because of the negative effects that such exemptions had on the tax systems, tax administrations and the economies of those countries. She added that the same wish was expressed with respect to private sector projects that were financed by public funding agencies, such as projects financed by the International Finance Corporation. The International Organization of la Francophonie therefore supported further work in that area with a view to the development of concrete solutions.

53. The observer from the International Tax Compact, which provided secretariat support for the Addis Tax Initiative, indicated that the issue of tax exemptions for development projects was related to policy coherence, which was one of the three commitments of the Addis Tax Initiative (in which 41 countries, including 21 developing countries, participated). That was why the issue was added to the agenda of the International Tax Compact/Addis Tax Initiative conference held in June 2017. He added that, during the conference, there was a strong commitment to work on the taxation of official development assistance.

54. The interventions that followed were all supportive of continuing the work on the topic. Members from developing countries stressed the importance of taking up the issue of broad exemptions for development projects, which was a source of concern for their tax administrations. There was also support for the work from members of developed countries, but they pointed out that it was important to bear in mind that seconded personnel from development agencies should be exempted

Mr. Sollund, the country observer from Norway, confirmed that Norway and its development agency no longer requested such exemptions and strongly supported doing work that would lead to recommendations in that area.

55. The establishment of a subcommittee on the topic was a possibility that was raised in the final paragraph of a conference room paper on the tax treatment of development projects (E/C.18/2017/CRP.24). The Secretary of the Committee suggested that one approach would be to have a paper prepared for discussion at the sixteenth session of the Committee in May 2018, and to then make a decision as to the best way of carrying the work forward. That approach was agreed to by the Committee.

G. Treatment of collective investment vehicles

56. Christoph Schelling introduced the item by observing that the tax treatment of collective investment vehicles in domestic law and tax treaties raised a number of issues. Noting the work done by other organizations in that area, he briefly explained why it was a relevant topic for the Committee. Apart from the technical issues related to the tax treatment of collective investment vehicles, the economic importance of portfolio investment by those vehicles (and the relevance of taxation in attracting such investment) made the tax treatment of collective investment vehicles an important question for both developed and developing countries.

57. As a first step, Mr. Schelling proposed the preparation of a paper outlining the issue, which would be discussed at the sixteenth session of the Committee. That was agreed to by the Committee.

58. In response to a question by a member who asked whether the work on the topic would also cover the tax treatment of so-called "non-collective investment vehicles", Mr. Schelling suggested that the question needed further analysis and should not be prejudged.

H. Hybrid entities

59. Dhruv Sanghavi was invited to introduce his paper on the proposed article 1 (2) of the Model Convention on hybrid entities, which could not be fully considered at the fourteenth session. Mr. Sanghavi emphasized that the purposes of the G20/OECD Base Erosion and Profit Shifting Project were to ensure that taxing rights were allocated to the State in which the economic activities that gave rise to income occurred, and to combat aggressive tax planning. However, in his view, article 1 (2) did not achieve any of those purposes.

60. Through examples and case studies, Mr. Sanghavi explained how article 1 (2) eroded source-State taxing rights and why it did not solve the problem of double non-taxation. He suggested that developing countries should be aware of those issues when negotiating tax treaties, and expressed a preference for a clearer treaty attribution rule. Mr. Sanghavi's analysis was not shared by everyone and it was agreed by the Committee that the issue would be considered part of the work of the subcommittee tasked with updating the Model Convention.

I. Article 12 (Royalties)

61. The Secretary of the Committee recalled the discussion on the treaty characterization of software payments that took place when the 2011 update of the Model Convention was finalized. At that time, it was decided that the commentary of

the Model Convention would include a quotation of the paragraphs of the commentary of the OECD Model Tax Convention on Income and on Capital dealing with the issue, but because some members disagreed with the views expressed in those paragraphs, it was then decided that the position of those members would be reflected in the commentary of the United Nations Model Convention in the form of a statement indicating that some members disagreed with the views expressed in a number of the quoted paragraphs.

62. The previous membership of the Committee had decided to try to provide more guidance in that area. A Subcommittee on Royalties, chaired by Pragya Saksena, was set up with the dual mandate of addressing the tax treaty treatment of software-related payments and of clarifying the meaning of the phrase "payments...for the use of, or the right to use, industrial, commercial or scientific equipment", found in the definition of royalties included in the Model Convention.

63. The Subcommittee met only once, in February 2017, when it was able to conclude its work on the second part of its mandate, which resulted in the approval by the Committee, at its meeting in April 2017, of changes related to the meaning of "payments...for the use of, or the right to use, industrial, commercial or scientific equipment" for inclusion in the commentary of the Model Convention. With regard to the part of its mandate that dealt with the treatment of software-related payments, however, the Subcommittee was unable to reach a final decision and recommended that the work on that issue be continued by the new membership of the Committee.

64. The Secretary concluded by inviting the Committee to decide whether additional guidance on that issue should be provided in the commentary of the Model Convention. He indicated that, if the Committee decided that such work should be carried out, it could be done by a subcommittee that would continue the work of the previous Subcommittee on Royalties, or it could be dealt with as part of a wider mandate that would be given to a new subcommittee tasked with updating the Model Convention.

65. After a lengthy discussion on the pros and cons of establishing a new subcommittee for the issue, it was decided that, in the light of its history and the work done so far, this was a special case. A subgroup should be formed within the subcommittee tasked with updating the Model Convention to deal specifically with the tax treatment of software-related payments.

J. Mutual agreement procedure

66. The Secretary of the Committee summarized the circumstances behind the creation of and the work done by the last membership of the Subcommittee on the Mutual Agreement Procedure — Dispute Avoidance and Resolution. It had been previously recognized that there was a lack of sufficient guidance on how to conduct the mutual agreement procedure; how to conduct other dispute resolution mechanisms within the mutual agreement procedure context, including arbitration, which was incorporated into the 2011 update of the Model Convention as an option; and how to avoid disputes. The Subcommittee had been created in 2015 following a suggestion by the secretariat. Relevant parts of the Subcommittee's mandate were to explore options for ensuring effective mutual agreement procedures and the adequacy of article 25, without either encouraging or discouraging the implementation of arbitration as part of the mutual agreement procedure in double tax treaties, which was a matter on which different countries had different views. It was noted that the work of the Subcommittee was limited to analysing the pros and cons of implementing arbitration, as previously addressed in the commentary on the Model Convention.

67. The Subcommittee's mandate had also included the consideration of other dispute resolution mechanisms, such as non-binding mediation or conciliation, as well as means of dispute avoidance, such as advance pricing agreements. That led to an update of the wording to be included in the commentary to article 25 for the 2017 update of the Model Convention. Since the creation of the Subcommittee, work had been done to update the Guide to the Mutual Agreement Procedure under Tax Treaties agreed by the Committee in its eighth session in 2012 and on drafting a handbook on dispute avoidance and resolution.

68. The Secretary asked Committee members to consider whether the work of the Subcommittee should be taken forward and, in case it should, what the focus of the Subcommittee's work should be. He then invited five speakers to give more detailed presentations on the work conducted so far by the Subcommittee.

69. A representative of the Vienna University of Economics and Business, Jeffrey Owens, gave a presentation on the draft handbook on dispute avoidance and resolution. He indicated that the number of mutual agreement procedures between developed and developing countries and between two developing countries had increased exponentially in past years. That meant that developed and developing countries shared the same problem. In his view, the work of the Subcommittee on the Mutual Agreement Procedure — Dispute Avoidance and Resolution should move forward to ensure that developing countries avoided disputes at the domestic level, and that when they were in a mutual agreement procedure they knew how to properly conduct all the stages of the procedure. He also pointed out that the current draft of the handbook on dispute avoidance and resolution was prepared under the direction of the last membership of the Subcommittee, and that the last membership of the Committee had already approved the outline of the handbook. The next steps could be to complete a more updated and expanded draft for consideration at the sixteenth session of the Committee.

70. A representative of the International Chamber of Commerce, Cym Lowell, underlined the importance that non-binding dispute resolution mechanisms could have within the mutual agreement procedure. He indicated that, particularly for countries without much experience in the mutual agreement procedure, it might be helpful to involve a third party that could assist them through the process. For example, assistance could take the form of informal participation by a third party or a non-binding mediation.

71. A representative of Repsol, Susana Bokobo,gave a presentation on the process of updating the Guide to the Mutual Agreement Procedure under Tax Treaties. The last membership of the Committee had approved the updating of the document, taking into account the base erosion and profit shifting and post-base erosion and profit shifting tax environment. She indicated that the idea behind the Guide was to have a very clear and useful quick manual for competent authorities. The work on the Guide was still in a preliminary stage.

72. A representative of the World Bank, Norbert Roller, gave a presentation on the need to swiftly design guidance for developing countries on how to conduct the mutual agreement procedure in a simple and affordable manner despite possible asymmetries of experience. The need for the guidance, in his view, was that developing countries had recently started to get involved in mutual agreement procedures, and the guidance produced so far did not sufficiently target them.

73. Finally, a representative of the Mexican tax ombudsman's office (PRODECON), Diana Bernal, gave a presentation on the tax mediation experience in Mexico. She indicated that taxpayers in conflict with the tax authorities could request the mediation of the ombudsman's office to obtain a final solution to the dispute.

74. A number of Committee members expressed the importance of taking forward the work on mutual agreement procedures. The Committee approved setting up a Subcommittee to deal with the matter. The Subcommittee on Dispute Avoidance and Resolution will be jointly coordinated by Mr. Krysiak and George Omondi Obell and will have the following mandate.

> The Subcommittee should consider and report back to the Committee on possible means of dispute avoidance and resolution, on both the domestic and international level. In particular, the Subcommittee will consider the Mutual Agreement Procedure, with a view to improving its effectiveness, building on the work done by the previous subcommittee. Particular attention will be paid to:
>
> - Mechanisms to avoid and resolve disputes arising at the domestic level;
> - Ways to ensure that the Mutual Agreement Procedure under article 25 (in either of its alternatives in the United Nations Model) functions as effectively and efficiently as possible; and
> - Issues associated with arbitration clauses and other means as options to supplement the Mutual Agreement Procedure.
>
> Following work on these areas, the Subcommittee will produce the following outcomes:
>
> - A draft United Nations Handbook on Dispute Resolution and Avoidance;
> - A draft updated text of the United Nations Guide to the Mutual Agreement Procedure;
> - Drafts of possible changes to the United Nations Model Convention and/or Commentaries, as appropriate.
>
> The Subcommittee is to focus especially on issues affecting developing economies, possible means of addressing them in a practical manner and ways to build confidence in dealing with them. It will provide recommendations to the Committee within its agreed mandate, on improvements, if any, for inclusion in the next version of the United Nations Model. The Subcommittee should work on the United Nations Handbook on Dispute Resolution and Avoidance and an update to the Guide to the Mutual Agreement Procedure as a priority.

K. Capacity-building

75. Harry Tonino and Jacques Sasseville of the secretariat reported on progress made in implementing and further developing the United Nations capacity development programme in international tax cooperation. Following a brief overview of the institutional background, intergovernmental mandate, history and main objectives of the programme, Mr. Tonino elaborated on the key features of the programme, with a focus on the following elements: (a) collaboration with country representatives, in order to ensure the relevance and effectiveness of activities; (b) synergies with the work of the Committee; and (c) partnerships with international and regional organizations active in the area, including in the context of the Platform for Collaboration on Tax. He then recalled the four main areas of work, namely: (a) the dissemination of the outputs of the Committee through courses and other training activities; (b) the development of publications and other capacity development materials; (c) the delivery of country-level technical cooperation projects; and (d) the development of online training.

76. Mr. Sasseville provided an overview of the publications developed in the context of the programme and reported on some recent developments, including: (a) the publication of the second edition of the United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries; and (b) further work done with respect to the United Nations practical portfolios on protecting the tax base of developing countries, including on base-eroding payments of rent and royalties and general anti-abuse rules. He then mentioned some recent and upcoming training and workshops, namely: (a) a United Nations-African Tax Administration Forum workshop on double tax treaties and base-eroding payments, held in Nairobi from 21 to 24 March 2017; (b) a United Nations-Inter-American Center of Tax Administrations regional seminar on international taxation, held in Cartagena, Colombia, from 4 to 7 July 2017; (c) a workshop on practical issues in protecting the tax base, to be held by the Economic Commission for Africa in Addis Ababa from 7 to 10 November 2017; and (d) a United Nations-African Tax Administration Forum course on transfer pricing, to be held in Lobamba from 4 to 8 December 2017. In addition, he reported on the implementation of country-level technical cooperation projects in Angola, the Dominican Republic, Ecuador, Mongolia, Panama, Paraguay, Trinidad and Tobago and the United Republic of Tanzania.

77. The Director of the Financing for Development Office of the Department of Economic and Social Affairs, and Hugh Ault, Professor Emeritus, Boston College Law School, launched the second edition of the United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries. The Director provided an overview of the history of the project that led to the publication of the Handbook, as well as of its second edition, including with respect to the Group of 20/OECD work on the Base Erosion and Profit Shifting Project and the work done by the Committee in that area. He mentioned that the second edition had updated all the chapters of the Handbook to reflect the latest developments in the work of the Committee, as well as the final results of the Group of 20/OECD Project. Mr. Ault reported that, similar to the method adopted in developing the first edition of the Handbook, the work done to produce the present revision reflected the input and feedback received from developing countries, members of the Committee and other relevant stakeholders, including those who had participated in a number of ad hoc workshops. After reviewing the structure of the Handbook and the main updates to the existing chapters, he introduced the contents of the two new chapters and noted that the present publication gave special attention to the particular situation of developing countries, including with respect to their administrative capacity and resources and the state of development of their tax systems.

78. During the ensuing discussion, several Committee members and country representatives commended the publications, workshops and other training activities, online training and in-country technical cooperation missions delivered in the context of the United Nations capacity development programme in international tax cooperation, and encouraged the Financing for Development Office to continue and expand its work. An advisory group comprising Committee members was established to provide advice and make recommendations on the implementation of such programmes.

L. Update of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries

79. During the session, the Committee discussed how to implement its mandate to keep under review and update as necessary the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries.

80. Mr. Tonino recalled that, for the purposes of the latest update of the Manual, a subcommittee was established at the ninth session of the Committee. That Subcommittee, coordinated by Wolfgang Lasars, was mandated to develop a compact practical training manual on the negotiation of bilateral tax treaties for beginners or tax officials with limited experience. The first draft was discussed at the tenth session of the Committee. After further reviews, the Manual was finalized and adopted by the Committee at its eleventh session (Geneva, 19–23 October 2015).

81. It was noted that, given the timing of its adoption, the above-mentioned version of the Manual neither reflected subsequent changes made to the Model Convention and the commentaries thereon, nor took into account relevant aspects of the final outcomes of the G20/OECD work on the Base Erosion and Profit Shifting Project. Accordingly, several members of the Committee recognized the need to produce an update to the Manual to reflect those developments.

82. The Committee formed a subcommittee, to be coordinated by Patricia Mongkhonvanit, to propose updates to the Manual, based on the following mandate:

> The Subcommittee is mandated to propose updates to the United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, based on the following principles:
>
> - That it reflects the current version of the United Nations Model Double Taxation Convention between Developed and Developing Countries and the relevant United Nations Commentaries as well as ongoing decisions of the Committee leading to changes in them;
> - That it pays special attention to the experience of developing countries and reflects their realities and needs at their relevant stages of capacity development;
> - That it draws upon and feeds into, as appropriate, the relevant work done in other forums, especially the work on the toolkit on tax treaty negotiation by the Platform for Collaboration on Tax.
>
> The aim of the Subcommittee shall be to present to the Committee an update of the Manual for consideration with a view to adoption to in 2019. Updates on the progress of the work shall be provided to the Committee at each preceding session. The Subcommittee may request the secretariat to develop necessary inputs and provide necessary support within its resources.

M. Issues related to the updating of the United Nations Model Double Taxation Convention between Developed and Developing Countries

83. Ms. Peters, as a member of the previous Subcommittee on the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries, commented on the main changes in the 2017 update of the Model Convention. With regard to base erosion and profit shifting, she explained that the most relevant changes to the Model Convention implemented in the 2017 update could be classified into three categories: (a) general anti-abuse rules, encompassing a new title and new preamble language to clarify that tax treaties were not to be used to facilitate treaty abuse or treaty shopping, together with a principle purpose test rule and a limitation on benefits clause, the latter following closely the limitation on benefits clause included in the 2016 update of the United States Model Income Tax Convention; (b) more targeted anti-abuse rules, consisting of a new 365-day holding period applicable to the payment of dividends and capital gains derived from the sale

of shares of companies owning real property, and a new tie-breaker rule applicable to dual-resident persons other than individuals, according to which the competent authorities of the contracting States could reach agreement under a mutual agreement procedure; and (c) changes to the definition of permanent establishment, particularly in connection with the list of activities that are considered to be of an auxiliary or preparatory character and the agency permanent establishment. The 2017 update of the Model Convention also updated the commentary on article 1 to explain the relationship between anti-abuse rules and a tax treaty, and included a new commentary on the principle purpose test rule and the limitation on benefits clause.

84. In addition, as explained by Mr. Mensah, another change introduced in the 2017 update of the Model Convention was the new article 12 A dealing with the taxation of fees for technical services, which was discussed in more detail during discussions on the tax consequences of the digitalized economy — issues of relevance for developing countries.

85. The Secretary explained that each membership of the Committee sought to update the Model Convention within its four-year mandate. The last Committee completed and approved the last update of the Model Convention in 2017. Some editing work was still being done.

86. Some Committee members were of the opinion that, although it was not currently foreseeable that a new update of the Model would be required in the near future, they should have the opportunity to discuss the matter. Therefore, they agreed to set up a subcommittee, which, among others, might do some work on the taxation of software and hybrid entities. The mandate of the Subcommittee is as follows:

> The Subcommittee is mandated to consider, make recommendations and provide proposed drafting for the next update of the United Nations Model Double Taxation Tax Convention (the Update) focusing on issues of the most relevance to developing countries.
>
> The Subcommittee will report to the Committee at its sixteenth session in 2018, and at each session thereafter, with a view to finalizing its work no later than the twenty-first session in 2020.

N. Other matters

87. The Committee noted the central importance of ensuring that key products of the Committee's work, including the United Nations Model Double Taxation Convention between Developed and Developing Countries, the United Nations Practical Manual on Transfer Pricing for Developing Countries and the handbook on the taxation of extractive industries, were published in electronic and printed forms and in all official languages of the United Nations. It urged efforts, including by potential funders, to ensure that was done as quickly as possible with the required quality. The importance of a clear and well-functioning Committee website was also recognized by the Committee, and the secretariat was asked to review the effectiveness and user-friendliness of the current site.

88. Some concerns related to other tax matters that might be important to developing countries were raised, and the secretariat advised that a position paper or a similar input could be developed for consideration by the Committee.

Chapter IV

Matters calling for action by the Economic and Social Council

Draft decision recommended for adoption by the Council: Venue and dates of and provisional agenda for the sixteenth session of the Committee

89. The Committee of Experts on International Cooperation in Tax Matters recommends that the Economic and Social Council review and adopt the following draft decision:

Draft decision

Venue and dates of and provisional agenda for the sixteenth session of the Committee of Experts on International Cooperation in Tax Matters

The Economic and Social Council:

(a) Decides that the sixteenth session of the Committee of Experts on International Cooperation in Tax Matters will be held in New York from 14 to 17 May 2018;

(b) Approves the following provisional agenda for the sixteenth session of the Committee:

1. Opening of the session by the Co-Chairs.
2. Adoption of the agenda and organization of work.
3. Discussion of substantive issues related to international cooperation in tax matters:
   - (a) Procedural issues for the Committee;
   - (b) Report of the Subcommittee on Updating the United Nations Model Double Taxation Convention between Developed and Developing Countries;
   - (c) Other issues:
     - (i) Update of the United Nations Practical Manual on Transfer Pricing for Developing Countries;
     - (ii) Update of the handbook on extractive industries taxation issues for developing countries;
     - (iii) Update of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries;
     - (iv) Treatment of collective investment vehicles;
     - (v) Dispute avoidance and resolution;
     - (vi) Capacity-building;
     - (vii) Environmental tax issues;

(viii) Tax consequences of the digitalized economy — issues of relevance for developing countries;

(ix) Taxation of development projects;

(x) Other matters for consideration.

4. Provisional agenda for the seventeenth session of the Committee.

5. Adoption of the report of the Committee on its sixteenth session.

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